# No. 12245

## United States

# Court of Appeals

### For the Ninth Circuit.

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MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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# Transcript of Record

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**Upon Appeal from the United States District Court for the Southern District of California Central Division**



Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United States District Court in and for the Southern District of California, Central Division

September, 1948, Term

No. 20401

UNITED STATES OF AMERICA,

Plantiff,

vs.

MILTON THEODORE SHAFER, THOMAS WINFREY, and FRED EARL SPELMON,

Defendants.

## INDICTMENT

[U.S.C., Title 21, Sec. 174; U.S.C., Title 26, Sec. 2553(a); U.S.C., Title 18, Secs. 2 and 371—Illegally concealing and purchasing narcotics, conspiracy.]

The grand jury charges:

### Count One

[U.S.C., Title 21, Sec. 174]

On or about September 23, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Milton Theodore Shafer, Thomas Winfrey, and Fred Earl Spelmon did receive, conceal, and facilitate the transportation and concealment, after importation, of a certain narcotic drug, namely: approximately 227 grains of heroin, which said heroin, as the defendants then and there well knew, had been

imported into the United States of America contrary to law. [2]

Count Two

[U.S.C., Title 26, Sec. 2553(a)]

On or about September 23, 1948, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Milton Theodore Shafer, Thomas Winfrey, and Fred Earl Spelmon did knowingly purchase a certain narcotic drug mentioned in United States Code, Title 26, Section 2550(a), namely: approximately 227 grains of heroin, which said heroin was not then and there in or from the original stamped package containing said heroin. [3]

Count Three

[U.S.C., Title 18, Secs. 2 and 371]

Prior to the date of the commission of the first overt act hereinafter set forth and continuing to and including the date of the return of this indictment, defendants Milton Theodore Shafer, Thomas Winfrey, and Fred Earl Spelmon did agree, confederate, and conspire, within the Central Division of the Southern District of California, to commit offenses against the United States as follows: knowingly to import and bring into the United States of America, and to aid and procure the importing and bringing into the United States of America, from the Republic of Mexico, and to receive, conceal, and facilitate the transportation and concealment after importation of, approximately 227 grains of heroin,

in violation of United States Code, Title 21, Section 174;

The objects of said conspiracy were to be accomplished as follows:

The defendant Milton Theodore Shafer was to deliver to one Fred Dauge the sum of $500.00 and said Fred Dauge was then to procure from an unknown source in the Republic of Mexico certain narcotic drugs and transport said narcotic drugs to Los Angeles, California, and deliver the same to the defendant Milton Theodore Shafer;

To effect the objects of said conspiracy, defendants committed divers overt acts in the Central Division of the Southern District of California:

(1) On or about September 9, 1948, the defendant Milton Theodore Shafer had a conversation with Fred Dauge;

(2) On or about September 10, 1948, defendant Milton Theodore Shafer and defendant Thomas Winfrey had a conversation with Fred Dauge;

(3) On or about September 16, 1948, defendant Milton Theodore Shafer delivered to Fred Dauge the sum of $500.00;

(4) On or about September 24, 1948, Fred Dauge delivered to defendant Milton Theodore Shafer a key to a locker in the Union Station, Los Angeles, California; [4]

(5) On or about September 24, 1948, defendants Thomas Winfrey and Fred Earl Spelmon removed

from a locker in the Union Station, Los Angeles, California, approximately 227 grains of heroin.

A True Bill:

/s/ Illegible Signature,
Foreman.

/s/ JAMES M. CARTER,
United States Attorney.

[Endorsed]: Filed Nov. 17, 1948. [5]

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At a stated term, to wit: The September Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday, the 29th day of December, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Peirson M. Hall,
District Judge.

No. 20,401-Cr.

[Title of Cause.]

ORDER SUSTAINING THE OBJECTIONS TO THE INTRODUCTION OF EVIDENCE ON COUNTS TWO AND THREE AND GRANTING THE MOTION FOR JUDGMENT OF ACQUITTAL AS TO APPELLANT UNDER COUNTS TWO AND THREE

For further (1) argument re oral motion of defendants to dismiss, and (2) further jury trial; Wm.

L. Baugh, Ass't U. S. Att'y, appearing as counsel for Gov't; Wm. Strong, Esq., appearing as counsel for Def't Shafer; Francis C. Jones, Esq., appearing as counsel for Defendants Winfrey and Spelmon; all three said defendants being present on bond; and both sides answering ready, the jury being absent, Court orders trial proceed.

Attorney Baugh argues in opposition to motion to dismiss count 1, and Attorney Strong argues in support of said motion as to count 1. Court overrules objection to introduction of evidence on count 1, and sustains objection to introduction of evidence on counts 2 and 3. Attorney Strong moves for judgment of acquittal as to each defendant on counts 2 and 3, and Court grants the said motion.

At 10:29 a.m. the jury returns into court, and all the defendants being present, and counsel so stipulating, Court advises the jury of the disposition of counts 2 and 3; and trial proceeds as to count 1.

Ray F. Love, heretofore sworn, testifies further. Gov't Ex. 1, 2, 3, and 4 are marked for ident.

At 10:56 a.m. Court reminds the jury of the admonition heretofore given and declares a recess. At 11:15 a.m. court reconvenes herein and all being present as before, including all three defendants and the jury, Court orders trial proceed.

Fred Dauge is called, sworn, and testifies for Gov't. Gov't Ex. 5 is marked for ident. [9]

At noon Court reminds the jury of the admonition not to discuss this cause and declares a recess until 2 p.m. At 2:13 p.m. court reconvenes herein

and all being present as before, including all three defendants and the jury, and counsel so stipulating, Court orders trial proceed.

Fred Dauge, heretofore sworn, testifies further for Gov't. Gov't Ex. 6 and 7 are marked for ident. At 2:35 p.m. Witness Dauge testifies further.

At 3:04 p.m. Court reminds the jury of the admonition heretofore given and declares a recess. At 3:20 p.m. court reconvenes herein and all being present as before, including defendants and jury, and counsel so stipulating, Court orders trial proceed.

Fred Dauge testifies further. At 3:45 p.m. counsel approach the bench and confer with the Court out of hearing of the jury.

At 3:50 p.m., again in the presence of the jury, Fred Dauge testifies further.

At 4:35 p.m. Court reminds the jury of the admonition not to discuss this cause and declares a recess in this trial until 9:30 a.m. Dec. 30, 1948. [10]

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[Title of District Court and Cause.]

## VERDICT

We, the Jury in the above-entitled cause, find the defendant Milton Theodore Shafer Guilty as charged in Count One of the Indictment; and find the defendant Thomas Winfrey Guilty as charged in Count One of the Indictment; and find the de-

fendant Fred Earl Spelmon Not Guilty as charged in Count One of the Indictment.

/s/ DARWIN WILLSON PIERCE, JR.,
Foreman of the Jury.

Dated: January 4, 1949. Los Angeles, California.

[Endorsed]: Filed Jan. 4, 1949. [13]

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[Title of District Court and Cause.]

## MOTION FOR NEW TRIAL AND POINTS AND AUTHORITIES

Comes Now Defendant Milton Theodore Shafer, and moves for a new trial, and to set aside the verdict against him upon the following grounds to wit:

I.

That the court erred in the admission and exclusion of evidence and in its rulings in matters of law.

II.

That the verdict was contrary to law and to the evidence.

III.

That the evidence was insufficient to support or justify the verdict.

IV.

That the Court erred in the matter of instructions refused, and instructions given and not given.

V.

That the presumption contained in the Statute, and as construed and applied in this case, is unconstitutional. [14]

VI.

That the indictment is fatally defective as it does not allege that the Acts charged were committed knowingly or fraudulently.

VII.

That defendant was denied due process of law, and a full and fair trial, guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

VIII.

That the narcotics involved in this case were seized and confiscated by the government by law in Calexico, and were not in the United States or in Los Angeles contrary to law.

IX.

That defendant Shafer was, if any offense was committed, as a matter of law entrapped into the commission of that offense by officials of the U. S. Government acting in an illegal manner.

X.

That the acquittal of defendant Spelmon by the jury required a verdict of acquittal as to the defendant Shafer as a matter of law.

XI.

That the narcotic drug was at no time, as a matter

of law, outside the possession and control of the United States Government in Los Angeles County, and such possession and control by the Government was exclusive and complete at all times.

XII.

That the jury could not, as a matter of law find defendant Shafer guilty of concealing or facilitating the transportation or concealment of the narcotic in Los Angeles; that there is no evidence of "receiving" by him; that the charge of concealing and facilitating concealment and transportation should have been [15] withdrawn from the jury by the Court.

/s/ WILLIAM STRONG,
Attorney for Defendant
Shafer. [16]

Points and Authorities

A conviction based in any part upon false testimony cannot be sustained, and must be set aside by the trial court.

Hysler v. Florida, 315 U.S. 411
Jones v. Kentucky, 97 F. 2d 335

Declarations and acts of a third person not charged as a co-defendant are inadmissable against the defendant when not made in his presence.

Glasser v. U.S., 315 U.S. 60
Canella v. U.S., 157 F. 2d 470
Braatelein v. U.S., 147 F. 2d 888
Marzano v. U.S., 149 F. 2d 923

The admission of the testimony of the Government official as to statements to him by defendants after their arrest was prejudicial and improper.

McNabb v. U.S., 63 Sp. Ct. 608
Ashcraft v. Tenn., 322 U.S. 143
Bayles v. U.S., 150 F. 2d 236

There is no presumption that a defendant knows his constitutional rights.

Evans v. Rives, 126 F. 2d 633

Cross-examination of a defendant outside the scope of the examination in chief is a violation of the Fifth and Sixth Amendments to the Constitution of the U.S.

Amend. V and VI, Const. of U.S.
Wilson v. U.S., 4 F. 2d 888
Madden v. U.S.,
20 F. 2d 289, cert. den. 275 U.S. 554
Tucker v. U.S., 5 F. 2d 818

Entrapment is contrary to public policy and voids the verdict and prosecution

Sorrels v. U.S., 287 U.S. 434
Butts v. U.S., 273 Fed. 35
Swallum v. U.S., 39 F. 2d 390
Lambert v. U.S., 101 F. 2d 960 [17]

The Federal officers were under the legal duty and requirement of seizing and forfeiting the narcotics in Calexico, and their possession of the narcotic constituted a Government seizure and confiscation as a matter of law.

21 U.S.C. 173, 174
19 U.S.C., 1607, 1608

It was the duty of the officers to turn over to the collector for the district in which the narcotic was first found, the narcotic in this case.

19 U.S.C. 1602

The narcotic by law remained in the district in which it was first found by the officers, and their possession was that of the Government.

19 U.S.C. 1605, 1602-1608

Due process of law under the Constitution requires application of fair and reasonable standards of procedure and evidence in a criminal case, and a fair and full hearing.

Const., U.S., Amends V and VI

McNabb v. U.S., supra

Simons v. U.S.,

119 F. 2d 539, cert. den. 314 U.S. 616

This constitutional guarantee includes the right to counsel with adequate time for full and complete preparation at all times, to fully examine, explain and rebut all evidence at all times, including the trial.

U.S. ex rel Mitchell v. Thompson,

56 F. Supp. 683

U.S. v. Dilman, 146 F. 2d 572

Glasser v. U.S., 315 U.S. 60

Wood v. U.S., 128 F. 2d 265

Panoni v. U.S., 281 Fed. 801

Widmer v. Johnson, 136 F. 2d 641

People v. Zammora, 66 Cal. App. 2d 166.

The prosecutor engaged in prejudicial misconduct at the trial.

47 U.S.C. 605

Nardone v. U.S., 316 U.S. 114 [18]

The presumption in the statute is unconstitutional.

Bollenbach v. U.S., 66 S. Ct. 402

No possession of the narcotic was or could have been established as to defendant Shafer as a matter of law.

Williamson v. U.S., 286 Fed. 852.

The indictment is fatally defective.

Crank v. U.S., 61 F. 2d 620

Hood v. U.S., 76 F. 2d 275

Pon Wing Quond v. U.S., 111 F. 2d 751

[Endorsed]: Filed Jan. 17, 1949. [19]

At a stated term, to wit: The February Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 11th day of April, in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable Peirson M. Hall,
District Judge.

No. 20, 401-Cr.

[Title of Cause.]

For hearing on motion of defendants for a new trial, pursuant to notice thereof filed Jan. 17, 1949, and for sentence; Wm. L. Baugh, Ass't U. S. Att'y, appearing as counsel for Gov't; Wm. Strong, Esq., appearing as counsel for Defendant Shafer; F. C. Jones, Esq., appearing as counsel for Winfrey; both of the said defendants being present on bond;

Attorney Strong moves for the association of Max Tendler, Esq., as counsel for Defendant Shafer, and said defendant consenting, it is so ordered.

Attorney Strong argues in support of defendants' motion for a new trial.

Attorney Tendler argues the insufficiency of the Indictment having to do with knowledge. Attorney Jones renews his motion for a directed verdict of acquittal as to Defendant Winfrey, and argues in support of said motion.

Attorney Baugh argues in opposition to motion for a new trial and for a directed verdict of acquittal.

The Court, after hearing argument of counsel, and being informed of the law, orders motion for a new trial denied and motion for non-obstante verdicto is also denied as to each defendant.

Court pronounces judgment upon each defendant as follows: [20]

District Court of the United States for the Southern District of California, Central Division

No. 20401—Criminal

UNITED STATES OF AMERICA

vs.

MILTON THEODORE SHAFER.

JUDGMENT AND COMMITMENT

On this 11th day of April, 1949, came the attorney for the government and the defendant appeared in person and by counsel, William Strong, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty, and a verdict of guilty of the offense of illegally concealing and purchasing narcotics in violation of Section 174, Title 21, U. S. Code, as charged in count one of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby ordered to pay a fine unto the United States of America in the sum of $5,000.00 on count one, and stand committed until paid; and, in addition thereto, be imprisoned in an institution to be selected by the Attorney General for the period of one (1) year, but that execution of said sentence of imprisonment be suspended and the defendant placed on probation for a period of three (3) years, the terms and conditions of which are that he shall not violate the law, that he shall forthwith pay said fine, and shall otherwise abide by the rules and regulations of the probation office.

It Is Adjudged that a stay of execution of commitment for non-payment of said fine be granted the defendant until 12 o'clock, noon, April 14, 1949.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed April 11, 1949. [21]

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Name and Address of Appellant: Milton Theodore Shafer, 262 So. Rampart, Los Angeles, California.

Name and Address of Appellant's Attorney: William Strong, 923 Chester Williams Building, 215 W. 5th St., Los Angeles 13, Cal.

Offense: Section 174, Title 21, U.S.C.

Judgment: One (1) year imprisonment, sentence suspended, plus Five Thousand ($5000) fine, and probation for a period of three (3) years; Judgment dated April 11, 1949.

Not Confined at Present: No bail on appeal set as yet.

I, the above-named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: Los Angeles, April 13, 1949.

/s/ MILTON T. SHAFER,
Appellant.

/s/ WILLIAM STRONG,
Attorney for Appellant.

[Endorsed]: Filed April 14, 1949. [22]

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[Title of District Court and Cause.]

## DESIGNATION OF RECORD TO BE USED ON APPEAL

Comes now the defendant named, Milton Theodore Shafer, and herewith requests the Clerk of the above Court to include the following named docu-

ments in the record to be used on the appeal in this case:

1. The Indictment.

2. The Plea of Milton Theodore Shafer.

3. The Demurrer to the sufficiency of the Indictment.

5. The Judgment of acquittal on Count 2 of the Indictment.

6. The Judgment of acquittal on Count 3 of the Indictment.

7. Transcript of the testimony adduced at the trial, and to include all the rulings of the Court on the reception and rejection of the evidence and Exhibits introduced in evidence.

8. The verdict of the Jury. [24]

9. Motion for New Trial.

10. Motion non obstanti verdicto.

11. Rulings of the Court upon Motion for new trial and upon Motion in arrest of Judgment.

Dated this 10th day of May, 1949.

MILTON THEODORE SHAFER.

By /s/ MAX TENDLER,

Attorney for Defendant.

Received copy of within instrument this 10th day of May, 1949.

/s/ JAMES M. CARTER.

[Endorsed]: Filed May 10, 1949. [25]

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 26, inclusive, contain the original Indictment; Verdict; Motion for New Trial; Judgment and Commitment; Notice of Appeal and Designation of Record on Appeal and full, true and correct copies of minute orders of December 6, 1948; December 28 and 29, 1948; January 4, 1949; April 11, 1949, and April 14, 1949, which, together with original plaintiff's exhibits 1 to 8, inclusive, original defendants exhibits A, B and C and copy of reporter's transcript of proceedings on December 28, 1948, December 29, 1948; December 30, 1948; December 31, 1948; January 3, 4 and 7, 1949, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $5.20, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 20 day of May, A.D. 1949.

EDMUND L. SMITH,
Clerk.

[Seal] /s/ THEODORE HOCKE,
Chief Deputy.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Mr. Strong: At this point, your Honor, the defendant Shafer moves for the suppression of all evidence in the case on the ground that the indictment does not state a public offense. We would like to argue the matter before your Honor.

The Court: You object to the introduction of any further evidence?

Mr. Strong: That is right.

The Court: What is it, a motion to suppress evidence or an objection to the introduction of further evidence.

Mr. Strong: An objection to the introduction of other evidence and also a dismissal on the ground that the indictment does not state a public offense.

The Court: You would like to argue the matter?

Mr. Strong: Yes.

The Court: The jury will retire to the jury room and wait until you are called. Remember the admonition.

The witness may step down during the course of the argument.

(Witness temporarily excused.)

(The jury retired from the courtroom at 2:30 o'clock p.m.)

The Court: All right, Mr. Strong. [17*]

Mr. Strong: If the court please, at this time I might state or would it be possible to have the court

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*** Page numbering appearing at top of page of original Reporter's Transcript.**

consider any objections made by one of the defendants as being made on behalf of all regardless of the one making them?

The Court: If you desire that.

Mr. Jones: Yes, sir.

Mr. Strong: It will be binding upon both and all of the defendants regardless of who makes the objection unless we expressly indicate we do not want to be bound thereby.

The Court: If that is agreeable to other counsel, that will be the order.

Mr. Jones: Yes, your Honor.

Mr. Strong: If your Honor please, this indictment fails to state an offense.

Directing your Honor's attention to count 1 of the indictment, your Honor will see that is laid under Title 21, Section 174.

Title 21, Section 174, is predicated partly upon Title 21, Section 173. Title 21, Section 174, says that if any person fraudulently or knowingly imports or brings into the United States—the indictment fails to set forth in any place in count 1 that any of these acts was done fraudulently or knowingly by either of the defendants.

The Court: Count 1 does. Count 1 is in several alternatives: "If any person fraudulently or knowingly imports or [18] brings any narcotic drug into the United States or any territory, or assists in so doing, or receives, conceals, buys, sells or in any matter facilitates the transportation, concealment or sale—"

Mr. Strong: It is our position the word "fraudulently" or "knowingly" applies to all of the alternatives.

The Court: That is correct. They have charged here that they did receive, conceal and facilitate the transportation after importation, and the last line says: "The defendants well knew it had been imported into the United States of America contrary to law."

Mr. Strong: That knowledge below is a knowledge which is required separate and apart from the requirement of the statute that the act itself of importing or receiving or controlling or concealing shall be done fraudulently and knowingly. That act of concealing or receiving or facilitating the transportation and concealment, that act in itself has to be fraudulently or knowingly separate and apart from the fact. In addition there is a further requirement that what it is that cannot be received, concealed or facilitated—or the transportation of it facilitated or concealed, is a drug—a drug which is a drug which had been imported as the defendants knew, contrary to the law.

Those two are separate requirements of knowledge and the first requirement—— [19]

The Court: In other words, your position is they must knowingly conceal it.

Mr. Strong: They must fraudulently or knowingly receive, conceal or facilitate the transportation of it.

The Court: And the second is that they must know it was imported contrary to law.

Mr. Strong: Yes. And the statute itself in certain instances eliminates the knowledge as to the second part, in certain instances, by a presumption which is written into 174 but that only goes to the second part, as to the knowledge of it having been imported contrary to law.

But the offense that is actually charged here has to be alleged in the terms of the statute of having been committed fraudulently or knowingly, the actual act, which is the offense of concealing.

The Court: Do you have any authorities on that?

Mr. Strong: I have a number of cases in which these allegations were required as to the mental operation of the defendants. One for example is Hurt vs. United States, 76 Fed. (2d) 275, which talks about the indictment being sufficient but that indictment charged all of these necessary elements, the mental elements. This is a felony, your Honor. The government here has completely failed to allege anything here which deals with intent which, of course, is a very necessary element of a felony and must be alleged. [20]

Now, very often it is stated in an indictment that the defendants did it feloniously or unlawfully or wilfully and that the acts done were done with that mental intent. The statute requires that that intent be alleged. It requires that the specific words "fraudulently or knowingly" be alleged. The Congress didn't require that the act be charged and be

shown to have been done wilfully but it did require that it be done fraudulently or knowingly and the government has failed to charge that.

The government in effect has failed to charge one of the most necessary elements of the offense and that is the frame of mind. This is a felony, your Honor.

I have another case, Pon Wing Kwong (phonetic), 111 Fed. (2d), which deals with indictments, but these types of indictments have these mental intentions alleged. There is no such allegation here.

I think your Honor will agree a felony has to contain a mental element and an allegation of it and the specific one here, as the Congress saw fit and has a right to select, was that it be done with a mental element of fraudulently or knowingly and the government here has wholly failed to allege and consequently one of the necessary elements of the offense is entirely lacking from this count. [21]

The charge does not contain it and for that reason the charge is void. The indictment is bad as to Count One on its face.

The Court: What are your other points?

Mr. Strong: Count two deals with a felony. In Count Two they say that the defendants knowingly purchased the said narcotic drug. The only difficulty with that is that Congress under Title 26, Section 2558, which I presume is a misstatement to some extent, because the actual violation is under 2553. Oh, I may say another thing as to Count One if I may.

The importation of narcotic drugs, the prohibition on the importation, which is Title 21, Section 173, which is the preceding Section to 174, and 174 simply makes the Act the same, but the preceding Section does not prohibit the receipt or concealment or facilitation of transportation and concealment after importation or drugs in all increases. There are various exceptions set forth.

In this Section, Section 173 of Title 21, the exceptions are enumerated. The Government hasn't stated in its indictment that this drug was imported contrary or outside of those exceptions.

The Court: Yes. It says "contrary to law."

Mr. Strong: Contrary to law, but there are certain specific exceptions—— [22]

The Court: If it is contrary to law it is not within the exceptions.

Mr. Strong: Well, the exceptions have to be specifically negatived.

That is the second basis for Count One aside from the others.

As to Count Two as I started to say to your Honor, Section 2553 of Title 26, Section 2553-A to be specific, states that it shall be unlawful for any person to do all of these acts except when the drugs mentioned are in the original stamped package or from the original stamped package. In addition to that these are these various exceptions to that Section also, your Honor.

Our first basis here is that the Government has to specifically negative the exceptions in the count itself in the indictment.

The second basis is that the word "knowingly" doesn't provide in the indictment the requisite allegation—proper mental intent on the part of the persons charged. This is again a felony as your Honor well knows. The Congress has a right to give various degrees of required intent in order to charge an offense. In some cases they use the word "knowingly." Knowingly is a degree of intent which is by far less in effect than wilfully.

* * *

The Court: Mr. Baugh, as to Count 1 I am somewhat impressed with counsel's argument. Any person who fraudulently or knowingly imports or brings any narcotic drug, or assists or in any manner facilitates the transportation or its sale knowing the same to have been imported contrary to law. It would seem to me that it is an essential element of the offense to be charged that they knowingly did receive, conceal and facilitate knowing that it was imported contrary to law.

Mr. Baugh: I will begin my remarks, if your Honor please——

The Court: You cured that in the conspiracy count. You allege it is a conspiracy to commit offenses against the United States as follows: Knowingly to import and bring into the United States and to aid and procure, and I take it that there the "knowingly" goes also to and knowingly aid as if it read, and to knowingly aid and procure and knowingly conceal, facilitate, and so forth. So in your conspiracy count that element is alleged.

Mr. Baugh: I would like to preface my remarks by a mention which is superfluous and that is that I am not prepared to argue this issue by the citation of any authority and I am constrained to simply rely upon my sense of logic in these premises.

Assuming that "knowingly" is a word that does modify "receives, conceals, etc.," it would seem to my mind that the [28] allegation that the defendants did receive and conceal and facilitate the transportation and concealment after importation knowing that the narcotic had been imported contrary to law, would by necessary inference mean that they didn't do it unconsciously, and it seems to me that it is not only by necessary inference but that it is implicit and that this was done knowingly. The only thing that is possibly missing is for the word "knowingly" to be explicit in its appearance in the indictment.

The Court: That is an essential element of the offense, and an indictment does not state an offense unless it contains and states all the essential elements of the offense. Certainly that would be true in connection with narcotics because narcotics can be legitimately dealt with. They can be legitimately transported, concealed I suppose—everybody who legitimately deals in narcotics conceals them; they probably have to or somebody would steal them.

Mr. Baugh: Perhaps it is specious argument, but to say that some people receive something knowing that it had been imported contrary to law would

certainly mean that they were conscious when they received it and that they knew that they received it. I have already prefaced my remarks with the fact that I have no cases in point on the subject, and I don't think that counsel has produced any cases in point on the subject. I have not read the cases that he had made reference [29] to.

The Court: He states that they plead "knowingly." What are those two cases, Mr. Strong?

Mr. Strong: Those cases which specifically plead all the elements, one is Hood vs. United States, 76 F(2d) 275. And I have just been advised that in this Circuit there is a similar case where this question was involved in connection with another statute, United States vs. Crank.

The Court: What is the citation?

Mr. Strong: We don't know the citation. But it went to the Circuit Court and the Circuit held that you had to allege those elements. I will try to look up that case for you.

The Court: Maybe I had better give you both a little recess.

Mr. Baugh: Very well, your Honor.

Those two cases, I might say, that the court mentioned, the court got a response to only one, 76 F(2d) 275.

Mr. Strong: I have some others here.

Mr. Baugh: The other one was 111 F(2d) 751.

Mr. Strong: Then I have another case at 2 F(2d) 969.

The Court: And the Crank case?

Mr. Strong: That is the one we don't know the citation of. That is in this Circuit.

* * *

The Court: Let me look at this. [30]

The Court: The defendants are present in person and by counsel.

Have you completed your research, counsel?

Mr. Baugh: If your Honor please, I have not completed the examination I would like to make of the law but I have used the time that the court has so kindly made available in these few minutes.

I would like to say first of all that I think I made a mistake in assuming that it was proper to assume that the words "fraudulently" or "knowingly" modified the words receive or conceal. I would like if I may to demonstrate the impropriety of that assumption this way:

If the court will look at page 2 of the trial memorandum, we will find a copy of Section 174 of Title 21. It reads as follows:

"If any person fraudulently or knowingly imports or brings in a narcotic drug, into the United States or any territory under its control or jurisdiction contrary to law or assists in so doing——"

I want to stop there if I may and in our imaginations I would like to place a semi-colon there for further reference later.

Now, if we skip from that point down to line 16 and the last three words and continue to read that way: "knowing the same to have been imported contrary to law." [33]

Well, it is ridiculous and redundant to say that if anybody imports it unlawfully knowing the same to be imported contrary to law—that is redundant.

So, I do think that it is true that where we placed our semi-colon in our respective imaginations is a proper place to interpret the actual presence of a semi-colon because it only is at the point where that semi-colon has been placed that this "knowing the same to have been imported contrary to law——"

In other words, anybody who receives—beginning at the end of line 13, "conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in," and then "knowing the same to have been imported contrary to law," it seems to me that that makes it obvious that fraudulently and knowingly do not modify the words "receive" or the word "conceal" and so forth. [34]

Now we are talking in this indictment about what was implicit but failed to appear as explicit, to wit, the word "knowingly." Now counsel in his effort to interpret this statute is trying to argue that implicitly "fraudulently and knowingly" modifies "receives." Well, it doesn't actually. It is only an interpretation that would produce that modification.

And, further, if the court please, I think that there is no magic in the word "knowingly" located at any particular spot in the indictment. I think that if the indictment, in substance, alleges knowingly that "knowingly" is alleged for all substantive, legal and practical purposes.

Now you can't receive anything very well unconsciously, referring now to the indictment. You can't conceal anything unconsciously. Concealing something is a conscious act, and that has to do with the mind. You can't conceal something unless you know you are concealing it or that you know you are trying to conceal it.

Now you read on down here and you will find that it is alleged that these defendants then and there well knew that the heroin had been imported into the United States contrary to law. Well, if they knowing that the heroin was imported contrary to law, consciously received it, consciously concealed it—and you can receive and conceal only consciously—then they knowingly received it and knowingly concealed it. [35] Counsel has not cited any authority whatsoever that is in point in any particular in this case. He is simply arguing by inference and without citation and authority.

Reference was made to the Crank case, and that is 61 F(2d) 620, and I will simply read the first syllabus here which says:

> "Indictment charging accused 'knowingly, wilfully and unlawfully received intoxicating liquor * * * unlawfully imported' held defective for failure to charge knowledge of unlawful importation."

Well, that is the reverse English and there of course that is obviously a correct determination of the law because the man had to know that this liquor that he imported was unlawfully imported. That was an essential element.

But here we have alleged the essential element. We have alleged, just to make it brief, that he concealed—just one word is enough—concealed stuff—and that is the word they use in the vernacular of those who use narcotics—which the defendants then and there well knew had been imported contrary to law.

I read from the case of Rumley v. United States, 293 Federal Reporter. The case begins at 532 and I read from page 547:

"The general rule is that the term 'wilfully' [36] cannot be omitted from an indictment when the term is part of a statutory definition. (Citing Wharton's Criminal Procedure, 10th Edition, Volume 1, Sections 285 and 318). But it has been held that where the facts alleged necessarily import wilfulness the failure to use the word 'wilfully' is not fatal to the indictment. (Citing cases)."

I submit, if your Honor please, by cold analysis and proper interpretation the words "fraudulently and knowingly" do not modify "receives and conceals." And I submit further that even if they do that the substance of that which is alleged in Count 1 of the indictment does charge knowingly received and concealed and facilitated the transportation and concealment as alleged in the indictment.

The Court: What have you to say as to Count 2?

Mr. Baugh: With respect to Count 2, if the court please, it is my analysis of the statute which in so far as I am able to read it says nothing of mental

attitude, that the use of the word "knowingly" is a sufficient description of the mental attitude.

The Court: For "unlawfully"?

Mr. Baugh: Your Honor please, I do not understand your Honor's question.

The Court: Is it a sufficient substitute for "unlawfully," for a person unlawfully to purchase a certain narcotic [37] drug, because you can lawfully purchase a drug?

Mr. Baugh: But, if your Honor please, it is totally impossible to lawfully purchase heroin——

The Court: Not from the original stamped package?

Mr. Baugh: Yes.

The Court: How do you know?

Mr. Baugh: When the heroin was not then and there in or from the original stamped package.

The Court: Suppose you get a prescription from a doctor for heroin and you go to a drugstore. You would knowingly purchase it. And the druggist would come out and give you the package. Maybe he got it not from the original stamped package.

Mr. Baugh: Yes, but if I knew that he took it not from the stamped package—— [38]

The Court: But you don't say that. You say he did "knowingly purchase which said heroin was not then and there in or from the original stamped package containing said heroin." You don't say that he knew that, that he knowingly purchased it.

Mr. Baugh: I must confess that your Honor's statement of that situation——

The Court: I think we had better recess the case until 9:30 tomorrow morning and argue it some more. You had better research that and also with reference to your conspiracy count, "knowingly to import" and so forth, "and bring into the United States of America," and "to aid and procure the importing and bringing into the United States of America from the Republic of Mexico and to receive and conceal."

You don't charge that. Under the Crank case the question arises in my mind whether or not even under your conspiracy count, you should not have also alleged at or about line 13—you have the indictment before you?

Mr. Baugh: Yes, I do, thank you, your Honor.

The Court: "knowing the same to have been unlawfully imported."

Now, I think that you have stated an offense in your conspiracy count because you have at least alleged that they conspired knowingly to import and bring into the United States of America this heroin which is in violation of the [39] first clause of Section 174. But I think that I will recess the matter until 9:30 tomorrow morning in order to give counsel further time to examine the cases.

I do find a case in Federal Second, a Ninth Circuit case. It is Sam Wong versus United States. There the court sustained the indictment under the narcotic clause which charged that he feloniously and fraudulently did receive, conceal, buy, sell and facilitate the transportation and concealment and distribution after the importation. Well, it does

say there the defendant knew it had been imported contrary to law. I thought that case was different than the Crank case. That is my mistake.

However, I will put the case over until 9:30 tomorrow if you wish some further time to examine into the authorities on the subject.

Mr. Baugh: Your Honor has not decided with respect to the first count and perhaps all of that can be gone over tomorrow.

The Court: Well, I think perhaps it had better because in order to reach the conclusion which you have urged, and which may be logical by virtue of the illogic of requiring one to knowingly violate the law, to knowingly import and know it was imported. It would seem that the phrase "knowing the same to have been imported contrary to law" would modify and apply to the words receive or conceal or buy [40] or sell or in any manner facilitate the transportation and concealment and so forth. But the question still is whether or not the word "knowingly" in the first clause applies to the phrase "receives, conceals" and so forth.

In that connection I have had recourse to the original statute and it differs from the re-print in the Code in that after the word or the phrase "or assist in so doing" there is a comma whereas in the Code that comma appears to have been omitted in transposition, so that it would and could be a logical place in the sense which was attempted to be expressed by the sentence.

* * *

The Court: Are you ready to proceed?

Mr. Jones: Yes, your Honor.

Mr. Strong: Yes, your Honor.

Mr. Baugh: Yes, your Honor.

The Clerk: Case No. 20401, United States vs. Milton Theodore Shafer, Thomas Winfrey and Fred Earl Spelmon. Is the defendant Shafer here?

The Court: Let the record show the jury is absent and that the defendants are each present in person and by counsel.

Mr. Strong: So stipulated.

Mr. Jones: Yes, your Honor.

Mr. Baugh: So stipulated.

The Court: Mr. Baugh.

Mr. Baugh: Yes, your Honor.

The Court: Have you conducted further research in connection with counts 1 and 2?

Mr. Baugh: If your Honor please, I have——

The Court: I don't think either count 1 or 2 are good.

Mr. Baugh: Then if I may——

The Court: I think as to count 3 it does state an offense—"knowingly to import and bring," that is a conspiracy, to "knowingly import and bring into the United States [46] of America and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico approximately 227 grains of heroin."

While it is charged there that there was a conspiracy to import and also to conceal, it does not charge them with knowingly receiving and con-

cealing and facilitating the transportation and concealment after importation of approrimately 227 grains knowing it to have been imported contrary to law.

Nevertheless, I think it is sufficient to state an offense—the offense which I have just described and the remainder of it may be regarded as surplusage.

I have thought a great deal about this case, counsel, and I think it is absolutely a necessary element of the offense to allege that they knowingly received, concealed and facilitated the transportation of it knowing it to have been imported.

Mr. Baugh: May I be heard briefly on that?

The Court: Maybe you can talk me out of it. Lots of people have.

Mr. Baugh: I will do my utmost to that end.

I address myself to count 1 and for convenience I ask the court, if the court will, to turn to page 2 of my trial memorandum. There is a copy of the statute there.

The Court: Yes. [47]

Mr. Baugh: As I suggested yesterday that we place a semi-colon for purposes of clarification in this argument after the word "doing" at line 13.

The Court: In the statute as originally enacted by Congress there is a comma and that is controlling.

Mr. Baugh: Yes.

The Court: That is controlling over the codification by the publisher.

Mr. Baugh: Yes, your Honor. Now, I think we will observe that from the beginning of that statute down to where I would like to interpret the presence of a semi-colon, they are talking about the importation or bringing of any narcotic drug into the United States.

This statute says that doing that contrary to law is a violation. That is what is said in substance to the point where I would have the semi-colon placed.

Thereafter they deal not with the importation contrary to law, but they deal with receiving, concealing, etc., which means, in effect, dealing in narcotics which are already in the United States—to make it wrongful to so deal. That clause says it is wrongful to so deal if you know that that which you are dealing in has been imported contrary to law. In other words, I think there are two ideas—one is importation contrary to law——

The Court: Concealment and selling. [48]

Mr. Baugh: No, if your Honor please, I would like to point out that on the one hand the first clause has to do with importing or bringing into the United States contrary to law—narcotics. On the other hand, after that semi-colon I want to insert—we are talking about dealing in the commodity when we know that it was imported contrary to law. In other words, I think there are two different ideas there and that it is sufficient where you are dealing with the second part—that is with respect to the dealing in narcotics, it is

sufficient to charge in an indictment that you receive it or conceal it or buy it knowing it to have been imported contrary to law.

That is our position. [49]

That is my position. It occurs to me that that is logical and that it is consonant with a proper construction of the statute.

Now in conjunction with that interpretation, as it has application to Count 1, I would like to turn to Count 3 and show how that interpretation has been carried over into the conspiracy count. There it is alleged, beginning at line 9 after the colon, that "knowingly to import and bring into the United States of America, and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico, and to receive, conceal and facilitate the transportation and concealment after importation of" so many grains of heroin in violation of the United States Code Title So-and-So, Section So-and-So.

In other words, there we have used the word "knowingly" at line 9 and "in violation of the United States Code" at line 13 together.

I believe, if the court please, that that is proper, and I believe that "knowingly" and "in violation of the code" affects all that is between those words, between "knowingly" and the phrase mentioned.

The Court: Counsel, if that is the case all you need to do is file an indictment and say that John Doe has violated Title 21, Section 174 of the United States Code. If you can supply any part of it by

reference to the code then you can [50] supply all of it. But that is not the rule.

Mr. Baugh: We can say, can we not, "knowingly in violation of law," and that is what the statute says, Section 174, "If any person knowingly imports (this stuff) contrary to law."

The Court: But you do not say that. You say it is in violation of Title 21.

Mr. Baugh: Yes, your Honor. Well, that is my position.

The Court: I do not know, since you have been talking I may have changed my mind about both Count 1 and Count 3 now. Maybe I think Count 1 is good and Count 3 is bad.

Mr. Baugh: Very well, your Honor. That is our position.

The Court: Let me hear from the defense as to Count 1. Counsel has almost convinced me that he is correct.

Mr. Strong: If your Honor will look at the Crank case.

The Court: Yes. I looked through it very carefully and I read it again this morning.

Mr. Strong: Then there is another case, several cases, that I can give to your Honor. And even the government's own case in its instruction—look at what the government says in Instruction No. 5—they are shifting from one foot to the other as they go along here. That is the instruction offered by the government. In the last paragraph it says:

"The statute is in the disjunctive, that is,

it uses the word 'or,' defining it as a crime to either knowingly receive, conceal * * *"

And they cite the Miller case. If your Honor will read the Miller case you will find that that is right, that those words "knowingly" apply to "receiving" and "concealing."

Now this is not the only statute that is phrased in this language, your Honor. There are dozens of statutes. And under every single one, as far as I can find, where the question came up the words "knowingly" and "fraudulently" or either one, where they were in the disjunctive, were required to be present in the indictment in connection with the receiving or concealing or the selling in the second part.

Now what counsel for the government wants to do here is to arrogate unto himself a function of Congress. He wants to put a semi-colon where Congress didn't put one.

The Court: No, he is defending an indictment drawn by somebody else.

Mr. Strong: But he is talking about the statute. He says, for the purposes of construing the indictment, let's put a colon in the statute. As your Honor rightfully pointed out, the difficulty with that is that Congress only put a comma there and didn't put a semi-colon there.

The Court: Let me look at the Miller case. (Examining citation.)

Well, the Miller case does not pass on the sufficiency of the indictment. Incidentally, it does not

appear to contain [52] the language of the indictment.

Mr. Strong: It appears on page 316 in the first paragraph, your Honor.

The Court: I see. (Examining citation)

Well, the long and short of it is that neither one of you have been able to find any case strictly construing the statute, that is, construing the statute with reference to whether or not the words "fraudulently" and "knowingly" apply to "receive," "conceal," and so forth.

Mr. Strong: May I continue with my cases?

The Court: Have you one? Just give me one.

Mr. Strong. There are no cases which hit it on the nose except the Cronk case.

The Court: No, it does not hit that part on the nose, it hits the other part of it.

Mr. Strong: It hits the bottom part.

The Court: There they omitted to say if they knew that it had been imported contrary to law.

Mr. Strong: Here is the Pon Wing Quong case, decided in 1940, where the court says, at page 753, where he talks about the first count, the second count and the third count.

> "The first count accuses appellant with fraudulently and knowingly importing into the United States a certain quantity of smoking opium contrary to law * * *
>
> "The second count accuses appellant with fraudulently and knowingly facilitating the transportation of the smoking opium . . . after its importation and contrary to law * * *

"The third count accuses appellant with fraudulently and knowingly concealing and facilitating the concealment of smoking opium after its importation * * *"

Then it goes on, at page 755, discussing the first count, and the court says this:

"Of course the accusatory allegations must be in the count of the indictment, and they are properly set forth therein."

Then the court continues:

"The first point reserved as to the second count of the indictment is exactly the same in principle as to the first count and our discussion and cited authorities there apply."

Again, although it isn't done directly, the Ninth Circuit has indicated that those elements which are set forth are the proper elements and must be set forth.

In addition to that we have the Wardfell case in the Ninth Circuit, 67 F(2d) 967. That deals also with 21 USC 174. On page 968 of that case the statute is discussed and then the indictment is discussed. There again he was charged [54] with "fraudulently" and "knowingly" concealing and facilitating the concealment of a lot of morphine.

The Court: In all the cases they had that in the indictment, all that I have been able to find. Have you been able to find any that do not have that in the indictment?

Mr. Strong: No. But that is a necessary element. One of the ways of determining whether it

is a necessary element is to see what the courts have done with it. [55]

Now, in the Crank case—may I read to your Honor some of the material here? Of course I don't have to go into all the basic rules of the indictment requiring the setting forth of all the necessary elements. That goes without saying.

Under the Tariff Act of 1922, which is the one that dealt with the same kind of allegations as in the Crank case—knowingly conceal and so forth, the court said the second part was necessary and that the first part didn't carry over to affect the second part. You have to have the two knowledges in there, one on top and one on the bottom.

The Court: No, they didn't say that in the Crank case. They didn't say anything about the first knowledge. They just mentioned the second one.

Mr. Strong: If your Honor will look at page 622 at the beginning of the paragraph it says:

> "In order to secure a conviction under Count Four",

which is the one that they are dealing with,

> "it was necessary that there should be proof that the accused had knowingly received, concealed, bought, sold, or in some manner facilitated the transportation, concealment, or sale of such merchandise; that it had been unlawfully imported and that appellant knew that it had been unlawfully [56] imported".

The next paragraph of course points out the basic rule: "Every ingredient of which the offense is

composed must be accurately and clearly alleged in the indictment".

Now, in United States vs. Cohen, 124 Fed. (2d) 164, Judge Augustus Hand writing the case. In that case the defendants were indicted under two counts, one for knowingly concealing and facilitating the concealment and so forth, of three grains of morphine knowing it was imported contrary to law and, second, for knowingly concealing and transporting and facilitating the concealment and transportation under 21 U.S.C.A. 174. There the question of the sufficiency of the indictment arose.

The Court: What case is that? I am still reading the Crank case.

Mr. Strong: I am sorry. It is United States vs. Cohen in which the court ruled on the sufficiency of the indictment and held that the allegations there made it a sufficient indictment.

The Court: Where is that?

Mr. Strong: That is U. S. v. Cohen, 124 Fed. (2d), 164.

As I say in none of these cases does the question arise in the way it would give a direct decision because nobody leaves those words out, because they are in the statute and they are required. Everybody inserts them. [57]

The Court: Let me ask you this question as to Count One. Could a person innocently receive, conceal and facilitate the transportation and concealment after importation of a narcotic drug if they knew that it had been imported at that time contrary to law?

Mr. Strong: That presume one thing which doesn't even have to be proved. All you have to show is a person has it. Now, they put a presumption on a resumption. They presume that he knew it was illegally imported if it is shown that he has it and then it is going to be presumed from the fact that he had it that he couldn't have done it innocently. That is a double presumption.

Mr. Baugh: If you Honor please, counsel has not aswered your question.

The Court: I know he hasn't.

Mr. Strong: May I finish. I think a person can innocently receive a thing. He can get it from somebody. Somebody can hand it to him without his knowing what it is or that he even has the drug.

The Court: But this alleges that he had the drug and that he knew then and there when he did receive it that it had been imported into the United States contrary to law. Isn't that alleging knowledge?

Mr. Strong: That is alleging knowledge as to its being imported as required by the statute. [58]

The Court: But if he knew when he received it that it had been imported contrary to law isn't that alleging knowledge? The only authority that there seems to be on it directly is the Crank case and it is the statement to which you directed my attention on page 22 where it says:

> "In order to secure a conviction under Count Four it was necessary that there should be

proof, one, that the accused had knowingly received"

and so forth

"and, two, that it had been unlawfully imported and, three, that appellant knew that it had been unlawfully imported".

But the court was not there considering that phase of the indictment and consequently this statement as to item 1 in that paragraph in parenthesis, must be regarded as dicta because the court doesn't pass directly on it. It passes on the other portion in the remaining discussion of that case.

Mr. Strong: I think that even dicta, however, of course carries weight with your Honor in interpreting the statute.

The Court: Yes.

Mr. Strong: And it is the Ninth Circuit.

The Court: The trouble with dicta is that when the [59] lower court follows dicta and it gets to the upper court they say: "Well, how many times must we tell these judges in the lower court that the authority of our decision only extends to the things actually decided."

Mr. Strong: Well, as I say, that is our position.

The Court: Do you have anything additional to offer?

Mr. Jones: No.

Mr. Strong: As to Count One.

The Court: All right. Now as to Count Two I cannot see how that can be good at all because a person can do everything that is said or alleged in

that count and still be innocent of any crime. Do you have anything more to offer?

Mr. Strong: Not on those two, your Honor.

The Court: Do you?

Mr. Baugh: No, if your Honor please, I have nothing further.

The Court: This will be the ruling of the court and I believe it is the first ruling on this point.

I am satisfied that Mr. Baugh's analysis of Section 174 is the correct analysis. I think if I were drawing the indictment, however, I would have put in "did knowingly, unlawfully, willfully, feloniously, illegally" and so on and so forth "received," but it isn't here. Consequently it is up to the court to decide at this point as to whether or not this indictment charges a crime within the framework [60] of this Statute.

I think that the words "fraudulently and knowingly imports or brings any narcotic drug into the United States" applies to the first clause—that is to say the act of importing or bringing or assisting in so doing and that the Statute defines another offense when it says "or receives, conceals, buys, sells or in any manner facilitate the transportation, concealment or sale of any narcotic drug after being imported or brought into the United States knowing the same to have been imported contrary to law."

I think that the knowledge there applies to the knowledge that it was imported contrary to law and that if a person receives it and the indictment alleges that at the time and place that they did receive, con-

ceal and facilitate the transportation and so forth they did know it had been imported into the United States contrary to law.

Moreover my conclusion in this respect is fortified by the last sentence in section 174, because it says:

"Whenever on trial for a violation of this Section the defendant is shown to have or have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." Now, this charges that he did receive it, conceal it [61] and so forth. So, if he received it and concealed it he must have possessed it and that depends on whether or not the evidence at the trial bears that out. But all I am dealing with now is the language of this indictment.

So, the objection to the introduction of any evidence as to Count One——

Mr. Strong: May I say just one thing before your Honor rules on it?

The Court: I gave you a number of chances to speak. I am ruling now.

Mr. Strong: But you brought up another point.

The Court: It says:

"Whenever on the trial,"

and I pointed out that that may not show on the trial but the indictment says that he did receive it and conceal it. Now, the receiving and so forth implies possession, so on the face of this indictment I am saying that this does charge a crime because

of that presumption which is contained in the Statute which merely fortifies the conclusion I reached concerning the first clause.

I was simply citing that by way of illustration.

Mr. Strong: All I was going to say is that the same presumption relates to importing which is the first part of the Statute.

The Court: The objection to the introduction of any [62] evidence on Count One on the ground that Count One does not state an offense is overruled.

As to Count Two I am satisfied, as I have indicated that everything that is alleged in this count could have been done by the defendants and still not have violated the law.

I think that they could knowingly purchase a narcotic drug which was not from an original stamped package and still do it legally and lawfully and for that reason I do not think it states an offense and the objection to the introduction of any evidence as to Count Two is sustained.

Now, as to Count Three——

Mr. Strong: May we argue on that, your Honor?

The Court: As to Count Three—I have asked you several times if you had anything more to say. I am ruling now.

Mr. Strong: I am talking about Count One and Two.

The Court: No. As to Count Three I indicated at the commencement of the session this morning that I thought that Count Three stated an offense—that an offense could be carved out of it. However,

after re-examining it during the course of the argument and re-examining the Statute I think that I was in error.

It was my impression that the charge here of a conspiracy knowingly to import and bring into the United [63] States of America and to aid and procure the importing and bringing into the United States of America from the Republic of Mexico approximately 227 grains of heroin in violation of the United States Code, Title 21, Section 174, would state an offense, even though the words beginning on line 11: "And to receive, conceal and facilitate the transportation and concealment of," might not do so because here this conspiracy charge, assuming that I am correct as to Count One, does not contain the necessary element which is in Count One—that is to receive, conceal and facilitate the transportation and concealment after importation knowing it to have been imported contrary to law.

So, that part of it doesn't state an offense. However, upon re-examination of the Statute I find that it says it is wrong to import and bring into the United States and so on and so forth, contrary to law.

Now, where does it say that here? It doesn't say it. All it says is——

Mr. Baugh: May I be heard? I didn't know whether you asked the question or not. That is what I mean by asking if I may be heard.

Mr. Strong: The arguments are closed.

The Court: I think the arguments are closed.

Mr. Baugh: I didn't mean to argue. I just wanted to ascertain if the court asked me a question. [64]

The Court: I remember Earl Rogers took 15 minutes to apologize to a jury one time because he interrupted the other counsel.

Mr. Baugh: May I explain myself? I didn't know whether that was an oratorical or genuine question propounded to me.

The Court: Well, I don't know what it was. It certainly wasn't intended to be oratorical. It was intended to be explanatory of the ruling that I am about to make.

Now, I do not think that you can charge an offense by saying that somebody did something in violation of such and such a section of the Code unless you also allege the things they did knowingly, to import and bring into the United States and to aid and procure such bringing into the United States contrary to law.

Now, where is that element supplied? I can't see it.

I might hear a little further argument from both counsel on that.

Mr. Baugh: Shall I be heard first, your Honor?

The Court: Yes.

Mr. Baugh: It seems to me that the expression "contrary to law" is synonymous with the expression "contrary to a particular law."

The Court: Title 21, Section 174—excuse me for interrupting you, doesn't prescribe the illegal method of [65] importing. The tariff laws relate to

the matter of importing. There is a legal way of importing opium and there is an illegal way. Section 174 does not prescribe the illegal way and it seems to me that unless you can explain it the words "contrary to law" mean contrary to the provisions of the Statute which permit the lawful importation of opium or heroin or whatever it is we are dealing with. [66]

Mr. Baugh: Title 21, Section 174, provides that if any person fraudulently or knowingly imports it contrary to law he is guilty of an offense.

The Court: That is right.

Mr. Baugh: This says that the plan was to import it in violation of this Section 174 which describes that which is unlawful. So it would seem to me, if the court please, by the rule—not the rule but it is synonymous to say—contrary to law or contrary to this section which describes the law broadly.

The Court: Why then did Congress put the words in there "contrary to law" in this section?

Mr. Baugh: Well, it is my judgment, if the court please, that they did that in order to make that section adequately broad and totally comprehensive, whereas here the pleader has simply limited himself more than is necessary but has included enough to make it the equivalent of contrary to law for all practical intents and purposes. That at least would be my view.

The Court: I do not think so, counsel. The objection to the introduction of any evidence under

Count 3 is sustained. We will call the jury down and go to trial on Count 1.

Mr. Strong: At this time may we move for a judgment of acquittal as to Count 2 and Count 3?

The Court: No, you may not—let me see. You have had a witness sworn and a question asked?

Mr. Strong: Yes, your Honor.

The Court: What is your position on that, Mr. Baugh?

Mr. Baugh: Well, if your Honor please, if the court feels as the court has ruled I am unable to cogently argue that the motion is not well taken.

The Court: Very well. Each of the defendants will have a judgment of acquittal on the grounds stated by the court as to Count 2 and Count 3.

Call the jury down and proceed to trial as to Count 1.

(The jury returned to the courtroom at 10:30 o'clock a.m.)

The Court: The record will show that the jury is present, each one of them in his or her place; the defendants are present in person and by counsel.

Ladies and gentlemen of the jury, since the commencement of the trial, for reasons of law with which you need not be concerned, Count 2, which charged that on or about September 23, 1948, the defendants, naming each of them, did knowingly purchase a narcotic drug, approximately 227 grains of heroin which was not from the original stamped package, has been disposed of by a judgment of acquittal by the court on legal grounds.

Likewise Count 3, which charged the conspiracy heretofore [68] delineated to you, has been disposed of by a similar judgment, likewise on legal grounds.

We therefore will proceed to trial on Count 1 of the indictment, which charges that on or about September 23, 1948, in Los Angeles County, within the Central Division of the Southern District of California, defendants Shafer, Winfrey and Spelmon did receive, conceal and facilitate the transportation and concealment, after importation, of a certain narcotic drug, namely, approximately 227 grains of heroin, which said heroin, as the defendants then and there well knew, had been imported into the United States contrary to law. [69]

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[Endorsed]: No. 12245. United States Court of Appeals for the Ninth Circuit. Milton Theodore Shafer, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed May 21, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeal
for the Ninth Circuit

No. 12245

MILTON THEODORE SHAFER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

## APPELLANT'S DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Pursuant to Rule 19 of the United States Court of Appeal for the Ninth Circuit, Appellant above named, herewith designates for printing by the Clerk of the United States Circuit Court of Appeal, all of the record on file in the above-entitled action material to the consideration of such an appeal by said Court, the following:

1. Indictment.

2. Appeal of Appellant Shafer.

3. Minute Order of Court dated December 29, 1948, sustaining the objections to the introduction of evidence on Counts Two and Three and granting the motion for judgment of acquittal as to Appellant under Counts Two and Three.

4. Verdict.

5. Motion for a new trial.

6. Minute Order of Court denying the motion for a new trial.

7. Notice of Appeal.

8. The following portions of the reporter's transcript, to wit: ([*] Page 17, line 5, to page 23, line 23; page 28, line 1, to page 30, line 25; page 33, line 1, to page 41, line 11; page 46, line 1, to page 69, line 12.

9. Concurrently filed herewith Appellant specifies the points that will be urged on the appeal prosecuted in this matter.

MAX TENDLER,
Attorney for Appellant.

[Endorsed]: Filed May 27, 1949.

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[Title of Circuit Court of Appeals and Cause.]

## APPELLANT'S DESIGNATED POINTS ON APPEAL

Appellant hereby specifies the following enumerated points to be argued at length in the brief, as containing the errors relied on, on this appeal.

1. Count One of the indictment does not state facts sufficient to constitute an offense against the laws of the United States.

2. That the verdict of the jury in this matter is in all particulars inconsistent and illegal.

3. That Appellant was placed in jeopardy as to Count One of the indictment for the reason that

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* **Page numbering appearing at bottom of page of original certified Transcript of Record.**

said Count One does not contain an element that is not involved in Counts Two and Three of said indictment, and for that reason the verdict in this case amounts to double jeopardy.

4. That the concert of action implied in Count Three of the indictment is the same concert of action implied in Count One and Appellant's acquittal under Count Three entitled him to an acquittal under Count One; and the Court was in error in denying Appellant's motion for a new trial, and motion for judgment notwithstanding the verdict.

5. The narcotic alleged in Counts Two and Three being the same narcotic alleged in Count One, judgment of acquittal under Counts Two and Three is, in its legal effect, an acquittal of appellant from knowingly and fraudulently receiving, concealing, having in his possession, purchasing, and facilitating the transportation and concealment after importation of the said narcotic contrary to law.

/s/ MAX TENDLER,
Attorney for Appellant.